

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

HEATHCOTE HOLDINGS CORP., INC.,	§	
	§	
	§	
Plaintiff/Relator,	§	
	§	Civil Action No. 2:08-cv-00349-TJW
v.	§	
	§	
CHURCH & DWIGHT CO., INC.,	§	
	§	
Defendant.	§	

**NOTICE REGARDING *AMICUS CURIAE* BRIEF
FILED BY THE UNITED STATES ON THE ISSUE OF WHETHER
FED. R. CIV. P. 9(b) APPLIES TO SECTION 292 FALSE MARKING CASES**

In connection with the pending Motion to Dismiss (Docket No. 23), Defendant Church & Dwight Co., Inc. respectfully notifies the Court that the United States filed an *amicus curiae* brief with the Federal Circuit in a pending appeal¹ on the issue of “whether, the pleading requirements of Fed. R. Civ. P. 9(b) apply in a *qui tam* action brought pursuant to 35 U.S.C. 292 for false patent marking, and, if so, what standard governs the pleading of intent to deceive, a requisite for liability under the statute.” A copy of the United States’ *amicus curiae* brief is attached hereto as Exhibit A.

In the *amicus curiae* brief, the United States’ position is (i) that the heightened pleading requirements of Rule 9(b) apply to all false marking claims, and (ii) that under this standard, a plaintiff must allege “sufficient underlying facts from which a court may reasonably infer that a party acted with the requisite state of mind.” Exh. A at 2 (quoting *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1327 (Fed. Cir. 2009)). According to the United States, “[b]are

¹ *In re BP Lubricants USA Inc.*, No. 2010-M960 (Fed. Cir.).

bones allegations that a defendant is a ‘sophisticated company’ which ‘knows, or should know’ [of the false marking], such as pled here, are insufficient to satisfy Rule 9(b)’s pleading standard, even under its relaxed standard for pleading intent.” *Id.* at 16.

Dated: October 29, 2010

Respectfully submitted,

/s/ Jennifer Parker Ainsworth

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*ATTORNEYS FOR DEFENDANT
CHURCH & DWIGHT CO., INC.*

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this motion was served on all counsel who have consented to electronic service, Local Rule CV-5(a)(3)(A), on October 29, 2010.

/s/ Jennifer P. Ainsworth

Jennifer P. Ainsworth